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T H E S I S

THE DEATH PENALTY IN
ANCIENT HEBREW SOCIETY

THESES

1929

Volume I

II. A Program of Religious Education for the
Japanese Children and Youth of Berkeley

Sumiko Marikita

III. Japan and Religious Education

Arthur Elmer Stewart

IV. Development of the Early Christian Attitude
toward Sex

Gertrude Wynn Stearns

V. The Use of the Project Principle in the
Modern Church School of Today

Louis Elmer Stearns

VI. Church Material for the 1920's
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William Elmer

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PACIFIC SCHOOL OF RELIGION

Berkeley, California



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THE DEATH PENALTY IN ANCIENT HEBREW SOCIETY

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IN ANCIENT HEBREW SOCIETY

By

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THESIS

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THE DEATH PENALTY IN EARLY HEBREW SOCIETY

I N T R O D U C T I O N

"History," says J.L.Myers in Cambridge Ancient History, "is the study of man's dealings with other men, and the adjustments of working relations between human groups."¹ Of all the dealings that human beings have had with one another, there is none that is of more interest to engage our attention than the act of any individual or of any group taking the life or lives of other human beings under any motive, sanction or mandate whatsoever.

Since self-preservation is instinctively nature's first law, a man's life, in a practical sense, is his greatest possession. To deprive a man of his life, from a scientific point of view, is to take all that he has. Philosophically, however, there are values that are greater than mere physical existence. Personality, for example, has come to be our truest and greatest reality. It is, indeed, from this point of view that human life finds its fullest meaning and significance. In early Hebrew society, however, no such considerations were held regarding man's life, certainly not for the individual as such.

In the search for truth on behalf of human welfare, and its value for the solution of social problems, a safe principle for investigation was well laid down not

¹ Cambridge Ancient History, Vol I p.1.

long ago by an outstanding scholar. He says: "The test of a genuine desire for truth is the willingness to investigate our conclusions, the maintenance of a sympathetic attitude towards new light, in firm assurance that the truth which is the goal of mankind . . . will also be the means of our salvation."¹ It requires little proof to show that the conclusions of law makers need constant revision both in principle and expression. Our modern statute books, for example, are full of ambiguous and contradictory legal prohibitions. More than one student in jurisprudence admits that the present criminal code is unscientific, illogical and impractical.

The purpose of this study, however, is not an attempt to point out the unethical elements which undoubtedly exist in our modern laws. A more ambitious and fundamental task is in view, namely, to seek out the ideas, customs and occasions under which the death penalty was inflicted in early Hebrew society. It seems quite clear that many of the underlying assumptions of our legal system rest upon the Hebrew scriptures. In fact an outstanding Bible scholar remarks that "Israel's codes represent the most important corner-stones of our modern English laws and institutions and therefore challenge and richly reward the study of all legal and historical students."²

The morals, customs and laws of the Hebrews need to

¹Jastrow, Hebrew and Babylonian Traditions, p.319.

²Kent, Israel's Laws and Legal Precedents, p.vi.

be examined with great care. They will need constant testing in the light of Christian ethics, whose function, as Ames says, is "to review all phases of moral behaviour, inquiring into the conditions, motives and ends and values of action."¹ The field of Old Testament study may, in other words, make a real contribution to the understanding of the origins and motives, ideas and customs, that have helped to shape our legal system, in so far as it has been influenced by the Old Testament. That the Hebrew scriptures have had a far-reaching effect upon our thinking and action, especially in regard to our attitude to our enemies and the offenders of our social order, is quite evident and needs no proof.

We have but to take the treatment of witches in Christian countries of recent times to realize the importance of the effect that a misunderstanding and misconception of the contents of the Old Testament will have upon human conduct. In Hebrew legislation sorcery was on a par with murder, and consequently received the same penalty. Failure to recognize the cruel paganism of such a law in our own day has made the "Bible an instrument in the perpetuation of such atrocities as the witch-burnings of England and Scotland, and the hangings which followed a witchcraft delusion in Massachusetts."² In view of the importance attached by the reader to what he finds in the Bible, and his conception and understanding of the same, it is of the

¹ Ames, "Religion and Morality," International Journal of Ethics, April, 1928.

² Bade, The Old Testament in the Light of Today, p. 80.

utmost importance that he trace the origin and development of its ideas, customs and practices, so as to place them in their proper place in the evolution of Hebrew life and religion. Many readers, doubtless, refuse to recognize the immoral and barbarous standards found in the Old Testament, or are shocked on their discovery, but the greater harm comes in a failure to recognize them as pagan and unethical.

It will be the most natural thing to find that the customs and laws of the Hebrews three thousand years ago will be the reflection of the prevalent morality of that time, and perhaps, also, repercussions of cruder moralities of the more ancient past. The same principle regarding the relationship of moral sentiment to law, is paralleled in our own day. Westermarch observes:

"The criminal law of a society may be taken on the whole for a faithful exponent of moral sentiments prevalent in that society at large . . . Criminal law is in the main on a level with the unreflecting morality of the vulgar mind."

He further pertinently remarks that

"Philosophers and theorists on law would do better service to humanity if they tried to persuade people not only that their moral ideas required improvement, but their laws, so far as possible, ought to come up to the improved standard, then they do by wasting their ingenuity in sophisms about the sovereignty of law, and its independence in the realms of justice."¹

It should be stated that the interest of this present inquiry is not simply antiquarian, but rather to study the objective phases of Hebrew life for the sake of

¹ Westermarch, Origin and Development of Moral Ideas, II p.201.

their bearing on life as it is now. Wallis very truly states that the aim of scientific sociology

" . . . is to,help specialists in all fields of historico-social investigation to work more consciously in view of their common subject-matter—human life as a whole. Specialists are always in danger of devitalizing their material by treating it abstractly; and in the degree that they realize the interconnection of their studies,they will co-operate efficiently in expounding the problems of life."¹

In view,then,of one of the greatest problems that confronts modern society,namely the infliction of the death penalty,let us proceed,as Sir Henry Maine has suggested,² to investigate the ancient principles of this practice in early Hebrew society by penetrating as far back as we can in the history and origins of Semitic ideas, customs and institutions. A discovery and understanding of Israelite ruling ideas and sanctions will explain why the death penalty was imposed. The limits of this study will then be confined to the offences against Hebrew society for which capital punishment was inflicted.

¹ Wallis,Sociological Study of the Bible,p.xxii.
² Maine,Ancient Law,p.xxxi.

PART I

ANCIENT RELIGION AND SOCIETY

I. PATTERN IDEAS

Ancient society was governed and determined like every society by "pattern" or ruling ideas. Two patterns characterize the early life of the Hebrews, namely, the predatory and the domestic patterns. The former, or the hunting attitude, was related to outside groups, while the latter followed social life within the group, such, as for example, the family group. "Hebrew religion idealized and spiritualized the value of the primary groups, especially the family."¹ It is through this pattern that the genius of Hebrew religion expressed itself. The main stream of morals and ethics which Judaism emptied into Christianity, had its fountain head in the social life of the Hebrew family. The domestic values in terms of fatherhood and brotherhood, in service and love, finally came to focus in Jesus' life and teaching. The domestic succeeded the predatory pattern, though they undoubtedly persisted side by side for ages. Within the family unit, as we shall see, the death penalty was almost impossible of execution. Under the control of the primitive and predatory pattern, where animal instincts largely ruled, there distrust and ruthlessness made an extension of kindness and mutual service impossible.

¹ Ellwood, "Social Evolution and Christianity," Journal of Religion, March, 1923.

Human society, in time, was to undergo a cultural transition through the influence of Jesus, and the domestic pattern was to dominate. As Ellwood says, "the pattern for the new civilization which must be ahead of us, if our world is not going back to barbarism, must essentially be the patterns which Jesus taught."¹

II. CUSTOM AND ITS RELATION TO LAW

Custom is the origin of law. Upon this most authorities are agreed. "The law maker does not precede, but follows, the developing social consciousness. What the law-maker enacts into formal precept or law must previously have proved its worth in the collective experience, otherwise it would have no binding force."² The interpretation of custom which legal procedure and enforcement find necessary, constitutes one of the very important sources of law. Compare, for example, the mining claims and customs of miners in the discovery of gold in California, 1849, and the subsequent enactment of the Civil Practice Act of California, 1851.³ In Germany some years ago a discussion existed as to whether custom is a source of law, or whether it is only an evidence of previously existing law. Savigny and Puchta both contended that law was not the product of custom, but that Volksgeist (common consciousness) creates Volksrecht (positive law).⁴ That there are exceptions to the general rule, will be granted.

¹ Ellwood, *op. cit.*

² Bade, *The Old Testament in the Light of Today*, p. 87.

³ Gray, *The Nature and Source of Law*, p. 296.

⁴ *Ibid.*, p. 89.

often owed their judicial decisions by those who felt that certain practices "commended themselves to the judges' sense of right or policy, or frequently because the judges believed, or pretended to believe that they were of supernatural origin."¹ In both Hebrew society and universally, the privileged and sacerdotal classes usually furnished the legislators and judges, who in turn expressed in legal enactments, both the customs and the will of the people, as well as their own interpretations suiting the time.

There existed but a small body of civil law amongst ancient peoples, largely because there was little need for that part of jurisprudence under archaic conditions. Custom itself was law. "No savage is free," remarks Lubbock. "All over the world his daily life is regulated by a complicated and apparently most inconvenient set of customs as forcible as laws."² Lowie says: "The unwritten laws of customary usage are obeyed far more willingly than our written codes, or rather they are obeyed spontaneously." Speaking of the Crow Indian, he further adds: "To become the laughing-stock of his daily associates for minor misdemeanors and to be completely ostracized for graver offenses, are terrific punishments for the native, and they have a deterrent force of which the infliction of penalties in our sense is often quite void."³ So, then, what we call morality "is in earliest times represented by a body of tribal customs rigidly enforced upon all members of the community by discipline and habit. What we now call civil law is represented by a series of prohibitions unsparingly

¹ Gray, op. cit., p. 300.

² Lubbock, Origin of Civilization, p. 301.

³ Lowie, Primitive Society, p. 398.

enforced by all members of the tribe upon the refractory."¹

Primitive morality amongst the Hebrews consisted in habitual conformity to customs or mores which were binding on all the community. Custom, or what the average person did, was expressed MISHPAT, 'judgement' and also variously expressed also as hok, 'the established,' miswa, 'tradition,' torah, 'instruction,' iedhuth, 'custom.' Thus we find repeatedly the statement, "it is not done."² "The old Arabians had no written laws," says Pedersen, "and yet their life was as firmly regulated as that of the Babylonians, whose statutes were carved in stone."³

Furthermore, tribal regulations were looked upon as divine, in primitive religions. The Hebrews, with their logical attitude or conception of revealed religion, made the ceremonial law statutory. Religious violations were looked upon as crimes against the law. To break them meant renouncing tribe and family, and the loss of protection from both. Thus the ceremonial and moral were identified and undistinguishable.⁴

Up until the time of the monarchy, custom largely took the place of written law and legislative authority. The change from the nomadic to a settled life had, however, brought about a new development of law and legal problems, largely because of the acquisition of property. The transition, also, quite inevitably led to a relaxation of discipline and weakening

¹Bade, op.cit., p.xix.

²Gen.29:26; 34:7; II Sam.13:12.

³Pedersen, Israel, p.353.

⁴See Lev.19:10-13.

of tribal custom of the desert. The law of the nomad had to adjust itself to the new environment. A superior authority than desert custom became necessary. External authority was needed to govern after the individual became less dependent on the community; yet public law was only possible because ancient custom was still necessary as a basis for the new authority. A good example of this is to be seen in the law of manslaughter made by the state, which previously took the form of private revenge only, and was simply an affair of the individual, family or tribe.

III. HEBREW IDEAS OF JUSTICE AND HOLINESS, SIN AND CRIME

Hebrew morality had no equivalent with ours of the present day. For example, sin was conceived as crime and vice versa, and both were infractions of tradition or custom. As late as the eighth century we hear the great pioneer prophet Amos crying, "Let justice well up like fresh water, let honesty roll in full tide;"¹ yet, even that was not an appeal for personal righteousness. It had little to do with individual morality. The prophets were voicing for the first time in Israel a protest against the oppression and luxury of the master classes. Similar ethical impulses, however, already had found expression in other great religions of antiquity. See for example, Nebuchadnezzar's inaugural prayer to Marduk, and the Egyptian hymn to Aton.²

We must remember also, that the justice of the eighth-century prophets, had no reality outside their own country.

¹ Amos 5:24.

² Jastrow, Religion of Babylonia and Syria, p. 296-99.
Breasted, History of Egypt, pp. 373-374.

One hundred years later, the law still had one standard of justice for the Israelite, but quite another for all foreigners. Fellow Hebrews were to exempt each other from interest on loans, but they were to exact it from all others.¹ Diseased meat, whose sale was forbidden within Israel, could be given to the 'ger' or sold to a foreigner.² Many a day had to come and go before, what we know as 'justice' arrived for Jew and Gentile. The New Testament itself, we find admitting the legality of slavery,³ a practice which the Priestly legislator of the sixth century B.C. (or later) had commanded.⁴

A people's conception of their deity gives the best indication of the nature of their morality and the height of the ethical development they have reached. We find the early Hebrew votaries endowing "Jahweh with their own passionate natures . . . attributing their own enmities to their national deity, and the horrible barbarities of war . . . had Jahweh's sanction and were enforced as religious duties."⁵ One of the blackest pictures of God in the Old Testament is that represented by Samuel hacking Agag to pieces in a human sacrifice "before" Jahweh at Gilgal.⁶ With such an inhuman conception of God as that, what chance was there for the sanctity of human life! That devout scholar Sir George Adam Smith paints the picture thus:

¹ Deut. 23:19 ff. See Ex. 22:25 ff.

² Ibid., 14:21.

³ See Eph. 6:5-8; Col. 3:22 ff.

⁴ Lev. 25:44 ff.

⁵ Bade, The Old Testament in the Light of Today, p. 68.

⁶ I Sam. 15:23.

"They prayed to him (Jahweh) to let them see their desire on their enemies, ascribed their victories to his love for them, their defeats to his anger, and they devoted to him in slaughter their prisoners of war, and the animals they captured from their foes; all exactly as their Moabite neighbours are reported, in very much the same language, to have done to Chemosh, the god of Moab."¹

As late as 700 B.C. Isaiah Ben-Amoz, the prophet of holiness, could conceive without any scruple of conscience a human pyre of the Assyrian enemy, clubbed to death to the sound of pealing music, offered as a colossal burnt-sacrifice to Jahweh under the guise of Melek!²

One of the most powerful beliefs existing in the lower levels of Hebrew religion, was taboo. The belief included two opposite conceptions, namely, that of 'holiness' and 'uncleanness.' The first had no ethical content whatsoever, but essentially meant the unapproachable. For example, any person passing beyond certain precincts was put to death.³ In some cases the deity was supposed to have smitten the desecrator with death. It is likely, however, that in the case of the death of Uzza, he may have fallen dead from the terror of his own act.⁴ Two other instances showing the prevailing notions of 'holiness' and 'uncleanness' are to be seen in the story of Saul's vow and curse to secure the favour of the oracle, as the Arabs do in going into battle, and also the account of Jonathan how he endangered his life by violating the vow because he took a little honey.⁵

¹ G.A. Smith, *Modern Criticism and the Preaching of the Old Testament*, pp. 128 f.

² Isa. 33:35.

³ See Ex. 19:12 f. Cf I Sam. 6. Such was the idea of the inviolability of the Sabbath, an infringement of God's Day.

⁴ II Sam. 6:6 f.

⁵ I Sam. 14:24 ff. See also the violation of the proper disposal of blood verses 32 ff.

We see in such cases as these the other aspect of taboo, the dangerous character of contamination, by partaking of certain foods, such as blood and animals offered or sacred to other deities. All such were accounted as abomination unto Jahveh. All plunder was also taboo. Achan and his entire family are put to death for taking the forbidden booty on the capture of Jericho. Both 'holiness' and 'uncleanness' were contagious like disease. One member of the community might pass on the dread infection to the entire community. All ~~that~~ Achan possessed, his wives, children, slaves and cattle were wiped out, that the source of pollution might be destroyed. The still common view, in Christian thinking, originating with Paul, that Adam's disobedience corrupted and damned all succeeding generations, is but a relic of primitive superstition, which the teaching of Jesus has not yet been able to eradicate.

Closely allied with the taboo notion was the idea of sin which identified it with misfortune.¹ Goodness, on the other hand, was identified with success and good fortune. The Hebrew held that the good carried its blessing within itself. This idea of retribution, of reward and punishment, created a very knotty problem, when it was at last seen that sometimes the wicked prospered. The book of Job is the classic example of this problem. The wicked, however, were ruthlessly consigned to sheol,² they were to be wiped off the earth,³ the good were to bathe their feet in their blood,⁴ and the soul that sinned shall die.⁵ The prophet Ezekiel, the first to enunciate the doctrine of individual responsibility,

¹ Num. 14:34; I Kings 8:32; Ps. 7:17.

² Ps. 9:17; 31:17.

³ Ps. 37:9; 104:39.

⁴ Ps. 58:10,

⁵ Ezek. 18:4, 20; 38:18; Jer. 31:30.

unfortunately made sin a ritualistic and not an ethical violation. The same idea of retributive justice is carried forward to the Talmud. Pestilence comes into the world for capital crimes, mentioned in the Torah, which are not brought before the earthly tribunal. Noisome beasts come into the world for vain swearing and for the profanation of the Name (of God). Captivity comes into the world for strange worship and incest, and for shedding blood.¹ Rabbi Ammi's view was, that there was no death without (preceding) sin, nor affliction without (preceding) transgression.² The misfortune of leprosy was regarded as coming for immorality, perjury and similiar sins.

We should bear in mind, in this connection, that the overt act only, received punishment in the Old Testament. It does not distinguish between acts of concupiscence and acts of malice, as Aristotle, Thomas Aquinas and as Dante³ did. The punishment of the Old Testament is physical and temporal and is meted out on the basis of its effect upon the social group. The Hebrew mind did not look beyond this life for reward and punishment.

IV. GROUP MORALITY

Primitive religion was not merely a subjective concept nor a private and individual matter. It was chiefly "a social bond profoundly affecting morality,⁴ very often consecrating immorality or condoning it." Religion did not exist for the saving of souls, but for the preservation and welfare of society,

¹ Tannaim.

² Sabbath. 55a

³ Reade, The Moral System of Dante's Inferno, chap. 3.

⁴ George Harford, Peake's Commentary, p. 185.

and in all that was necessary to this end every man had to take his part, or break with the domestic and political community to which he belonged."¹ The individual, being merged in the group, his fellow-members were collectively responsible for his mis-deeds. "To treat the single man as the unit, for punishment or reward, ancient thought envisaged the whole group of which he was a part. . . . The worth of the individual is thus subordinated to that of the group, and the security of the whole outweighs the welfare of the individual part."² The individual could find protection only behind the bulwark of social organization. Preservation of the social unit was self-preservation. Such is the object of jurisprudence in our own day, as Bentham has pointed out, the security of the general good of the community. "The aim of the state," as Reade points out, "is always the bonum commune rather than the protection of individuals The external act thus satisfies the state's claim, but not its aspiration."³

The only responsibility thus found among the early Hebrew people, was group responsibility. The family, as the primary unit, was the root of the kinship of the group, and carried its solidarity over into the clan and, finally, into the national group. When, for example, a member of a tribe was slain it was said "our blood has been slain." Out of this consciousness of group solidarity grew the corollary notion

¹ W.R. Smith, Religion of the Semites, p. 29.

² S.A. Cook in Smith's Religion of the Semites, p. 590.

³ Reade, The Moral System of Dante's Inferno, pp. 29 f.

of collective responsibility and collective guilt. This closely knit organism, with no part separated, involved not only the ruin of a guilty man but also his whole house, his guilt being transferred as an infection or contagion from one part to the whole mass, and even from one generation to another.¹

This doctrine of the transmissibility of guilt, led to some of the most cruel practices of Old Testament times. Christian theology, in our own time, has not yet rid itself of the barbaric ideas which underlie the current interpretations placed upon the so-called deluge, the destruction of Sodom and Gomorrah, and the like. It is indeed significant that even Abraham questions the integrity of Jahveh who is represented as determined on destroying the innocent with the bad who live in the cities of the plain.

Not only was the utter destruction of innocent women and children decreed upon in such cases, but also cattle as well were destroyed, because it was supposed that guilt lay upon the entire community, upon man and upon beast.² Children especially were involved in the doom of their fathers. Their individual rights were entirely unrecognized and unthought of. Illustrations of such cases are too numerous to mention, but the following are the most glaring instances:

Lev. 20:5. A man and his entire family may be put to death for Molek worship.

¹ Ex. 34:7.

² See the case of Achan, Josh. 7:24; the Gibeonites, II Sam. 21:2 ff., Naboth's sons, II Kings, 9:26.

Num.16:1-34. The wives and little children of Dathan and Abiram are destroyed at the command of Moses.

Judg.21:16-24. The inhabitants of Jabesh-Gilead are massacred for high treason in not sending its contingent to the war against the Benjaminites. All were destroyed but four hundred virgins who were given over to the enemy. Tradition states that Jabesh had maintained an alliance with the Amorites.

Josh.7:24 f. Achan and his entire family are put to death for breaking a taboo.

II Sam.21:6,9. Saul's two sons and five grandsons are hanged 'before the Lord' to expiate an offense committed by Saul years before.

I Sam.3:29. Saul's outbreak of rage against the priestly city of Nob, is expressed in the massacre of men and women, children and infants.

II Sam.3:29. David's curse of doom on Joab's house for the murder of Abner.

II Sam.24:17. A pestilence slays seventy thousand people, presumably because of David's sin of taking a census, contrary to Jahveh's wishes.

II Kings, 2:23-25. Elijah by a curse causes two she-bears to slay forty-two children of Bethel, because they made fun of his bald head.¹

The Deuteronomic Reformation, however, rescinded this application of the law of retributive justice and eliminated the principle that children should be put to death for the sins of their fathers.²

On the other hand, however, it should not be overlooked that it was held from early times that the family and succeeding generations participated in the good as well as the evil forces of life. Noah and his household are saved;³ Lot is

¹ For further instances see the following: Judges, 1:25; II Sam. 14:9 f; I Chron. 21:17; II Kings, 9:7-9; Ps. 137:7-9; Josh. 24:15; Ex. 20:5 f; I Sam. 20:16; 24:21; Gen. 18:19; Jeroboam's house, I K. 13:34; 14:10 etc.
² Deut. 24:16.
³ Gen. 6:18; 17:1.

rescued because of his relation to Abraham;¹ and Rahab the harlot and her family are saved by her treachery.²

V. BLOOD KINSHIP AND BLOOD REVENGE

The kinship of blood is the binding element in all primitive societies. Blood relationship even antedates family kinship. It was the blood tie and no other bond that made the primitive family. It was indeed the only ground upon which a social group could be constructed. It is this kinship, as Wallis remarks, that forms "the central tie around which the activities of life revolve."³

Blood, in primitive times, was looked upon as life, capable of transferring life with all that it includes and carries. Blood, as a consequence, was used universally in making contracts and covenants. One did not necessarily have to be born in a family, for example, to become a member of it. The taking in of the blood of a member of the group, or even by mere contact, accomplished the purpose. Herodotus tells us that the Scythian drank the blood of the first man he killed in battle. The American Indians who subjected the Jesuit founder of the Huron Mission, Jean de Brebeuf, to such terrible torture by fire, laid open his breast when they saw him sinking to death, drank his blood and devoured his heart so as to imbibe the courage of their valiant enemy.

We have ample evidence of this conception of kinship and covenant of blood in the Old Testament. Compare, for example,

¹ Gen. 19.
² Josh. 6:23-25.
³ Sociological Study of the Bible, p. 40.

the ritual in Exodus 24, where the blood of the sacrifice is applied to the people as well as to the altar.¹ Note also the smearing of the blood on the doorposts in the Passover ritual, which is nothing more than a compact of blood-brotherhood covenant which bound the deity to protect the inmates of the dwelling from harm.² Other practices, such as circumcision, the blood covenant at Sinai,³ Jahweh's compact with Abram,⁴ the worshippers of Baal gashing themselves at the Carmel altar,⁵ and the dipping of the hand in the dish,⁶ are all, undoubtedly, based on the same idea of blood covenant.⁷ It is not so long ago that men signed their names to agreements on parchment, in their own blood, or affixed the sign of the cross in blood. It is Mephistopheles who says:

"Thou undersignest merely with a drop of blood.

.

Blood is a juice of a very special kind."⁸

One of the chief functions of Jahweh was to dispense justice. As a member of the group, he was, of course, bound to do so always in their favour, which he supposedly did, in about the same way as did their own chiefs in a selfish and barbarous manner. Jahweh became, in this way, the guardian of justice and morality among the Hebrews. His will thus coincided with Israel's national custom and morality.⁹

¹ Ex. 24:8.

² Chap. 12:7, 23.

³ Chap. 24:8.

⁴ Gen. 15:9-1

⁵ I Kings, 18:28.

⁶ Matt. 26:23.

⁷ See also Abraham's compact with Abimelek at Beersheba, Gen. 21:25-32.

⁸ Faust, Part I, 1360.

⁹ Bade, The Old Testament in the Light of Today, p. 74 f.

From blood-kinship to blood revenge was but a step. As a member of the group Jahweh says: "I will avenge the shedding of your own life blood . . . whoever sheds human blood, by human hands shall his blood be shed."¹ In such a case the obligation of blood-revenge lay upon the whole group, while, on the other hand, the blood guilt of the offender rested on the whole of his clan in turn. To rob a clan of a life by murder was one of the greatest of infringements. The breach could only be healed by taking a life from the robber clan in turn. A vivid illustration of this practice is found in the eighth chapter of Judges, which records the slaying of two Midianite chiefs by Gideon, who had killed his "brethren, even the sons of his mother." Zalmunna and Zebah admit the right of the Hebrew chieftain and they both submit willingly to the Bedouin law of the desert, and the violated breach is restored by their death.

Retaliation for the loss of man-power was not, however, the only motive for blood-revenge. Blood itself being sacred, was a taboo, and to spill it upon the earth was to pollute the ground. Cain, we notice, is cursed off the earth which had been tainted and poisoned by his brother's blood. Cain is now a plague-stricken homicide, whose very presence is a menace, he is therefore marked with a sign to others to avoid any contaminating contact with him. Again, the blood itself was also thought of as demanding retribution.²

¹ Gen. 9:5 f.

² Chap. 4:10. Abel, very likely, is a representation of Israel the peasant, to the Priestly writer, who is murdered by the marauding Kenite patriarch.

Vengeance, 'nakam,' without doubt, was also a form of restoration by the offended party to maintain the honor that had been insulted. "He who gets vengeance, breathes again, gets satisfaction, 'nihham.'¹ Arab chiefs have a very great sensitiveness to honor and to pride. "Shame follows the conception of honor as its shadow."² From Lamek we hear the boast that "if Cain be avenged seven times, then seventy and seven times Lemek."³ Samson makes a grand display in death out of revenge for his eyeless sockets and the shame heaped upon him by his enemies.⁴ Gideon covers himself with glory in slaying the two Midianite chiefs.⁵ To be a by-word and a reproach among the enemy was gall indeed.⁶ The worst calamity that could come to a Hebrew chief was to suffer extermination and oblivion. The head of every house desired above all to have his name remembered and continued after death. This was the only reward he knew after his return to sheol. The fear, then, of being cut off without succession occasioned one of the greatest reasons for revenge.

One of the most notable instances of revenge told in the Old Testament, is that of the demand of the Gibeonites, where the blood-guilt resting upon Saul's house, should be expiated by the death of seven of Saul's sons. After being subjected to some horrible form of sacrifice, their bodies were left exposed to the mutilations of the birds and beasts.⁷

¹ Pedersen, Israel, p. 389.

² Ibid., p. 242

³ Gen. 4:23.

⁴ Judg. 17:28-30.

⁵ Chap. 8.

⁶ Ps. 44:14; Jer. 2:36.

⁷ II Sam. 21:1-14.

Equally horrible was the almost total extermination of man and beast of the Benjaminites of Gibeah, because of an outrage and violation of the rights of a guest, and for rape and murder.¹ Joab, again, as the avenger of Asakel, his brother, slays Abner while he is under the pledged security of David the King. Even the King dares not punish his nephew for such a cold-blooded deed, simply because the right of the goel to blood-revenge would be upheld by the custom of the times.²

Blood-guilt was, indeed, a very dangerous thing to come into a family. Abigail praises David for avoiding it.³ On his death-bed, however, he is troubled concerning Joab's guilt and he leaves it to Solomon, his son, to avenge the affront given by Shimei and Joab.⁴ Absalom seems to have taken a most unusual course in avenging his half-sister, Tamar, the violation done her by Ammon, David's first-born.⁵ Both the Book of Numbers and the Book of Jubilees forbade a settlement by the paying of a fine, though the reverse must have obtained, hence the prohibition.⁶ The barbarity of blood vengeance continued till after the time of the prophets. An amelioration appeared in Deuteronomy⁷ which declared that children should not be put to death for the sins of their fathers, yet the custom of retaliation remained for a much longer period. An Arab proverb says, "A Bedwi will take his blood-revenge after forty-years." The penal law, then, as Maine puts it, "was not a law of crimes; it was a law of wrongs or . . . Torts."⁸ It was not so much the social body that suffered as the individual and his kindred.

¹ Judg. 19:20.

² II Sam. 3:28 ff.; II Sam. 3:27.

³ I Sam. 25:26.

⁴ I Kings, 2:1-9. See also II Sam. 3:28 f.

⁵ II Sam. 1:13.

⁶ Num. 35:31 f.; Jub. 21:19 f.

⁷ Deut. 24:16.

⁸ Ancient Law, p.

P A R T II

H E B R E W L A W

I.THE HISTORY OF LITERARY TRADITION

The problem of reconstructing Hebrew laws and customs presents many difficulties. The bulk of surviving nomadic customs is too small to be able to disentangle and describe them with any degree of certainty. It is likely that no bit of the Old Testament is genuinely Mosaic. No tradition, either, has come to us unchanged from nomadic days. The fact is the sources we have belong to a period when the Israelites were living a settled life in cities and pursued agricultural occupations. It is not till the eighth and ninth centuries B.C., five hundred years later than the time of Moses, that the first Old Testament literature was collected and edited. To make matters worse for our purpose, the compilers complicated matters more, by modifying the ancient historical material to make it serve their purpose of edifying their time. The chronicler saw the imperfections of his predecessors and, so, deleted the superfluous and unpleasant, drawing a veil over the cruder elements in the life of his remote ancestors—a most human and universal tendency. For example, the Priestly code carries an elaborate ritual back to the time of Moses. The tendency to read ideas back into the past, is the only explanation for much that is otherwise inexplicable in the earlier parts of the Old Testament. We know, for example, that in post-exilic times that it was a capital crime to

worship images, much less to possess them, yet we read that that King David had them in his household. There is no other explanation of this than to say that the law against idolatry had not been promulgated up to his time and, therefore, knew nothing of such a law which really came into existence at the time of the Reformation under the prophets.¹

The composite nature of the Hexateuch is very obvious, a fact well known now and universally known and accepted. Though we possess very little historical knowledge of the nomadic period previous to Isarel's conquest of Canaan, yet embedded within their later literature we find folk lore, legends, myth, sagas and poetry, all going back to the very early life and times of the Hebrews.

Only a very condensed and brief statement of the very complex literary history of Hebrew tradition is possible here. Reference to any up-to-date introduction to the Old Testament, such as the standard work by S.R.Driver, will furnish the fullest details.

The following are the main literary sources and documents, chronologically arranged. Some of the dates are merely approximately.

Early traditions and songs.	1200-1000 B.C.
J Document (Jahvist). Tradition collected in Judah and found scattered through the Pentateuch and Joshus.	850

¹ I Sam. 19:13-16. Cf. Gen. 31:19, 33-35; Deut. 5:7-10; 7:2-5, 16, 25; 13:1-18; 17:2-7; 18:20; 20:16-18; Ex. 20:3-6; 32:33.

E Document (Elohism).Also found scattered through the Pentateuch and Joshua. Both J and E are called 'prophetic' documents,since they represent the point of view of the prophets.	750
J and E compiled into a single document JE after much re-editing of both to harmonize the two.	c650
D Document (Deuteronomy).A legal code.	650
Historical books of Judges,Samuel and Kings,edited in the spirit of Deuteronomy.	600-570
Ezekiel.	592-570
JE and D combined.	c 560
P,Priest's Code,Leviticus,etc.	550-450
JEDP,Pentateuch completed by final revision and redaction.	c 420 ¹

Because of their peculiar theory as to the origin of their law,the Hebrew historians never directly and explicitly recorded new laws as they arose.² When their laws were written they consisted of a codification of existing practices, and were in the main but "literary embodiments of religious reformation."³ Jahveh was regarded as the source of all law. Moses was conceived to be the medium through which the torah was revealed on Sinai,then given to Joshua who,in turn, delivered it to the people.

Hebrew law may be divided into three classes:

- (1) Ceremonial law.
- (2) Judicial law.
- (3) Moral law.

¹ See Bade,The Old Testament in the Light of Today,p.xxii.

² Ezek.40-48 is a likely exception.

³ G.B.Gray,in EB,III,Art.'Law Literature.'

We are here chiefly discussing the second class, judicial law. Chronologically this material may again be sub-divided into the following groups:

(1) Pre-Josianic.

(2) Deuteronomic.

(3) Priestly.

1. Pre-Josianic law.

Laws before the time of Josiah have a two-fold division: (1) Words and (2) Judgements. The latter consisted of hypothetical instructions based on precedent and embodied a codification of consuetudinary law or customary usage. The former written laws had their expression mainly in what is known as the Book of the Covenant, found in Exodus 20:22-23:33. This document, embracing torah and mishpat, is probably the first attempt to collect legal precepts, and is the oldest collection of Hebrew laws which have been preserved. Its ruling principle is the lex talionis, and in general suits the agricultural mode of life. These same principles operate among the Arabs today. Though combined with J and E, yet there are elements which go back to a nomadic, or semi-nomadic society, showing the document to represent the period of transition from nomadism to a settled life.

The chief interest of the Book of the Covenant seems to be property. For example, seduction of a virgin is regarded as damage to property.¹ Selling into concubinage is the accepted form of marriage. Polygamy is fully recognized. Murder is dealt with by the custom of blood-revenge,

and all personal injuries are settled by the law of retaliation. The various crimes dealt with are murder and manslaughter, violence to and cursing of parents, manstealing, injury from animals, theft and compensation, sorcery, bestiality and sacrifice to other gods.

A very interesting question arises regarding the similarity of the Book of the Covenant with the code of Hammurabi.¹ Johns has calculated that out of the forty-five judgements, ~~thirty~~ five have points of contact, and half are parallel.² Some assume that the likeness is due to common human experiences. This can hardly explain the similarities, however. In both codes the deity is the ultimate source of authority. They both limit the action of the lex talionis,³ and place man-stealing and witchcraft in the same category as murder. Sellin suggests that the similarity of both the codes to Hittite laws indicates the existence of a common code current through Western Asia since 3000 B.C.⁴ Pedersen also calls attention to the same likeness of the laws of these three peoples. He contends that the laws of the Hebrews clearly indicate influence by the foreign culture they met in Canaan. The evidence of conflict between the ideas in Hebrew legislation regarding restoration and retaliation, show that two types of law are traceable behind Hebrew laws, namely that of Arabian tribal organization, and Babylonian state law.⁵

¹ 2285-2242 B.C.

² See Johns in Hasting's DB, Extra Vol., 'Code of Hammurabi,' for further comparisons.

³ Ex. 21:26 f., Hammurabi Code, Sections 196-201.

⁴ Sellin, Introduction to the Old Testament, p. 44.

⁵ Pedersen, Israel, pp. 405 ff.

There are also some marked differences between the two codes. The Hammurapi code protects property with a much more severe penalty than that of the Book of the Covenant. For example, the theft of an ox required a five-fold restoration in Israel, while in Babylonia thirty times its value was demanded. In Babylon the criminal could only hope for pardon in so far as his life being worth more to the state than the loss would likely cause. Yet, even a brigand should have a trial before being put to death. There is a strange omission in the Hammurapi code of any penalty for murder.

One conclusion is at least certain regarding the Hebrew code, it was not a peculiar possession of the Hebrews alone. Johns' conclusion is that both the Hebrew and the Babylonian codes belong to the same group of ancient legislation, and that both are compromises between two distinct types of law, namely, that of a nomadic type, and a settled community type. Johns believes that this compromise took place both in Palestine and in Babylonia. "The more primitive laws in the Mosaic code are properly Israelite, and are an inheritance from old nomadic customs. The more advanced laws, are due to gradually assimilated Canaanite sources." The latter, he believes, have affinity to the code of Hammurapi, due to influences before the Hebrew invasion.¹ J.M.P. Smith also thinks that Babylonian influences had long ceased before the Israelites entered Palestine. He adds, that Solomon (c 970) had not even reached such a high stage of development as Hammurapi who spoke of

¹ Johns, Code of Hammurabi. See also Jastrow, Hebrew and Babylonian Traditions.

himself as commissioned "to establish justice in the land, to destroy the wicked in order that the powerful may not injure the weak."¹

With regard to the difficult problem as to how much the Hebrews may have borrowed from surrounding nations, we are not able to enter here. What Israel owed to Egypt and to Babylon has not been determined yet. "The great and greatest achievements of mankind in the domain of culture and government . . . have been accomplished by mixed races," Jastrow truly remarks.² That the Hebrews were not a pure and unmixed race is clearly indicated in Ezekiel 16:13. "Thy father was an Amorite and thy mother a Hittite." Jastrow thinks that the Hebrew immigrants "drank deep of Babylonian culture—before they relapsed into the life of pastoral nomads, when with other Semites they passed into Syria and Palestine."³ This seems to be borne out by tradition on the Hebrew side, which makes the Euphrates valley the first home of mankind.⁴ On the Babylonian side, a political relationship is confirmed by the sway of Sargon over the West c 2600 B.C., and the medium of the Babylonian language throughout the West a thousand years later.

Regarding Egypt's influence on Hebrew life and customs, the evidence is very slim and inconclusive. The psychological and geographical differences between the two peoples made borrowings somewhat unlikely. The barriers due

¹ See also the Gilgamesh Epic.

² Jastrow, *op. cit.*, p. 11.

³ *Ibid.*, p. 23.

⁴ Cf. with the deluge story of Genesis.

to language, race and mental insularity, would but increase the difficulty of borrowing. However, as it has been pointed out,¹ it is hard to conceive of Judea and Babylonia as two water-tight compartments, without any influences spilling over into the other.

2. The Deuteronomic Code.

This code is an enactment by enlargement on the Book of the Covenant, as state law under Josiah in his eighteenth year, 621 B.C., and marks an advance in humanitarian feeling in law. This collection of civil and ecclesiastical law, making custom statutory, grew partly out of the prophetic movement, and came into being to meet the requirements of a new age. This code makes provision for the poor, servants, widows, orphans and strangers. It also deals with such matters as the appointing of strict and impartial judges in all the cities,² the creation of a supreme central tribunal,³ and the setting apart of cities of refuge⁴ for cases of manslaughter. There is now a distinction made between murder and manslaughter,⁵ the treating of seduction not as an injury to property but as a wrong to moral purity,⁶ and the criminal's family is to be no longer punished⁷, as well as making other limitations to punishment.⁸ Unfortunately, the excessive strictness of the law of idolatry, on the other hand, was an expansion of the cruelty of the law in another direction.

¹ McCown, Hebrew and Egyptian Apocalypticism. (Pamphlet).

² Deut. 16:18-20.

³ Chap. 17:8-13.

⁴ Chap. 19:1-13.

⁵ Chap. 19:4-6.

⁶ Chap. 22:28 f. Cf. Ex. 22:16 f.

⁷ Chap. 24:16.

⁸ Deut. 25:1-13.

⁹ Chap. 13, 17, 27. Cf. Ex. 22:20; 16:1-17; 23:14-17.

3.The Priestly Document.

The Priestly code, the framework of the Pentateuch, was the work of an age after Ezekiel, and rests on an ancient traditional basis. In Nehemiah, chapters eight to ten, we find mention of the introduction of this code, after the exile. Its chief purpose seems to have been for the regulation of worship; law and ethics being left alone; and civil rights and state organization being presupposed. Included in the JEDP framework is an older document, known as the Holiness code,¹ a work, doubtless, of the exilic period. It contains ethical and legal enactments from the holiness point of view, combined with a mild spirit of humanitarianism similar to Deuteronomy. The Priestly code, as a whole, is more concerned with the ceremonial system than with the sanctity of human life. The Sabbath, for example, is to be observed on the pain of death.² Infringements of ritual are as grave as moral offenses.³

Following the Priestly codes we come to the Rabbinical period which produced the Mishna and the Talmud. These, however, are so late in time, they are not referred to very much in this study, since they throw little light on early life and customs in ancient Israel.

4.The Decalogue.

The origin of the decalogue as we have it, is lost

¹ Lev. 17-26.

² Ex. 31:15.

³ Chap. 30:33, 38; Lev. 17:4, 9, 14; 19:8. Cf. with Nu. 35:31; 31:15; 35:2.

in obscurity. "The separate history of individual precepts of the decalogue, certainly reaches beyond Moses and beyond Jahvism."¹ Moses may have had something to do with arrangement and adoption of some of the commandments, but in its entirety, the decalogue is the "outcome of a long and complex development" and the product of "different developments of divers origins."² It is of interest to note here, that the Egyptian Book of the Dead, older than Moses by a thousand years, contained nearly all the requirements of the Hebrew decalogue. Sellin remarks, that for ages the Babylonians and Egyptians had "summed up the demands of ethics and religion in similiar short formulae."³

Besides what is known as the Standard decalogue,⁴ there is, what is known as the Jahvistic or Ritual decalogue, in Exodus 34:17-28. As it stands in its present form, it must have been a Canaanite agricultural document, with commands for a type of life, which Moses could never have given to his nomadic followers. Other forms, than this one in our possession, may have been **known** to the Jahvist. The precept regarding the Sabbath is very likely a later addition. The fourth command⁵ indicates child sacrifice. Frazer points out that there is no morality here regarding man's relation to man. God is but a feudal lord to his vassals. More importance seems to be given to the maternal feelings of goats than to the prohibitions of murder, theft and adultery.⁶

The two variant forms of the Ten Commandments, or the

¹ Bade, The Old Testament in the Light of Today, p.89.

² Ibid., p.88.

³ Sellin, Introduction to the Old Testament, p.40.

⁴
⁵ Ex.34:19 f.

⁶ See Budde's enumeration HANL; Bade, OTLT, p.91; Wellhausen.

Ethical and Elohist decalogues, Exodus 20:1-17, and Deuteronomy 5:1-22, in their present form are later than the sixth century B.C., though they are much older than that. For example, the prohibition of images is certainly later than the time of Moses.¹ The commandments were addressed to the male heads of families, and assume group morality.

II. THE ADMINISTRATION OF HEBREW CUSTOM AND LAW

Legislation is the crystalization of custom. Custom, or common law, such as we find preserved in the Book of the Covenant, ruled tenaciously down until the Deuteronomic period. An illustration of the persistence and survival of custom in the midst of the Canaanite civilization, is seen in the case of the Rechabites, in the time of Jehu, who, like the pre-exilic prophets, clung to simple nomadic and pastoral life and manners of the desert.

A clear picture of Hebrew judicial procedure up to the time of Josiah, is almost impossible, since judicial procedure had never an established character. Such law or custom as existed was administered freely by the heads of families and clans. Judges 21:25 records: "In those days there was no king in Israel, and everyone did exactly as he pleased." This shows clearly that at that time custom was law. The father, for example, possessed unlimited powers over his family.² When the tribe or clan became the unit of society, then the sheikhs or tribal

¹ Cf. David's teraphim.

² Gen. 38:24 indicates that he had the power to burn his children.

heads attempted to settle disputes and dispense law and order. Even, then, enforcement was possible only because of the custom of the people. Such, indeed, was the situation under which Moses administered his rule. The three variant stories of the appointment of elders, or heads of tribes¹, show how they were to assist Moses in the pronouncement of judgement. In Numbers, chapter twenty-five, there is a striking instance of the power exercised by Moses, where he uses most drastic action against Israel's unwholesome affiliation with Moab. He is commanded to "seize all the leaders of the people, and execute them in broad daylight before Jahweh."² Nothing but the iron rule of custom would permit such wholesale execution. One is reminded of a modern court martial carried out under the rigid law of the army. Saul's slaughter of the priests of Nob for their innocent aid to David, is another instance of the inexorable and relentless law of custom.³

1. Lex talionis.

The lex talionis⁴ was the dominant principle in Hebrew law and custom. It regulated both private and judicial vengeance. So strong was this doctrine in Hebrew thought and life, that Christian thinking also became obsessed with the same idea. Our penal view of punishment, the substitutionary view of the Atonement, and the conception that God demands satisfaction and vengeance, are all based upon the

¹ Ex. 18:13 ff.; Nu. 11:16 ff.; Deut. 1:13 f.

² Nu. 25:4. See also chap. 5:5.

³ I Sam. 22:9-23.

⁴ Ex. 21:23-25; Deut. 19:21; Lev. 24:20.

same idea. That the Old Testament conception of justice as the law of life for life, underlies our present method of treating criminals with the death penalty, needs no demonstration. Roscoe Pound is very much to the point when he says, that in criminal law, one of the problems is to "get rid of the retributive treatment of crime—an idea which is the basis of primitive justice."¹

At first the custom of *lex talionis* certainly took the form of revenge for personal injury, then it became an established custom, '*mishpat*', but finally it became penal law, taken over from the individual by the state. It is likely true, as Pedersen points out, that when '*gemul*' is applied to vengeance,² it is then evident that vengeance is not simply a claim of the avenger, but a necessary consequence of the unjust action itself.³ In general, however, the law of talio was given for a relatively archaic condition of society.

This standard of 'eye for eye, and tooth for tooth,' not only regulated all blood revenge, all reward and punishment, but was also made to fit the association between specific offenses and corresponding penalties. The principle of talio was most particularly applied in the conception of divine retribution, especially in later Judaism where it became a statutory conception of divine law.⁴ Reward and punishment were thus conceived on the basis of kind and measure of desert.

¹ Pound, *The Spirit of the Common Law*, p. 49 f.

² Isa. 35:4.

³ Pedersen, *Israel*, p. 395.

⁴ Moore, *Judaism*, II.

The Rabbis thought that the Egyptians were drowned by water because Pharoah had thrown the Hebrew children into the Nile. "Let my eyes (which had no pity) become blind," was said.¹ Cranmer said: "This was the hand that wrote it, therefore it shall be the first to suffer punishment." The fifth chapter of Numbers declares that the sexual region of the unfaithful wife should shrivel up.² Diseases, such as leprosy, came, many Jews thought, as a punishment for sin. Such also was the inference of Job's comforters. Many Christians still believe they see immediate punishment from God in calamities that occur in the world.

The practice of retaliation, in both ancient and comparatively modern times, has been carried to an extent of the utmost severity. The Gibeonites, as we have seen, though intreated to accept pecuniary compensation for their murdered kinsmen, would accept nothing less than the death of Saul's seven sons to wipe out the debt.³ False witness, again, was a most serious crime in Israel and any one who forged a charge of murder against another, would himself be put to death.⁴ In later Judaism the Saducees held the witness was liable to the death penalty when the accused was actually executed, but the Pharisees, on the other hand, said from the very moment the sentence was pronounced.⁵ Procedure for conviction in capital cases became almost impossible under such division of opinion. The Mishnah brands a court if it executed one man in seven

¹ Taanith 21 a.

² Nu. 5:19-31. Cf. Ezekiel's rigorous doctrine of retribution, chap. 18. Cf. Luke 13:1-5; John 9:1 f.

³ II Sam. 21:1-10.

⁴ Ex. 20:16; 23:1-3, 7; Lev. 19:16; Deut. 5; 17; 19:16-21.

⁵ Sifre, Deut. Sect. 190; M. Makhot 1:6.

years. Rabbi ben Azariah said one in seventy years. Another Rabbi went so far as to declare that if he had been in the Sanhedrin no man would have been put to death. Rabbi Simeon ben Gamaliel held that the death penalty would only multiply murders in Israel. Though these were pretty largely but academic discussions, yet they are indications as to which direction the wind of humanitarianism was blowing.

Not only has the principle of retaliation and revenge been carried to the extent of extreme severity, it has been carried just as far in the direction of absurdity. Animals and even inanimate objects, which have accidentally caused death have been often destroyed, just as though they were responsible beings. We are all familiar with the person who becomes enraged with some object against which he has stubbed his toe. The Hebrew code of the Covenant held animals responsible for their deeds, and ordered an ox stoned that gored a person to death.¹ If, however, the animal had become a habitual gorer, then the owner is also responsible, and both were to be put to death.² In Europe, animals, insects, rats, moles, vermin and caterpillars have been tried by formal court and condemned to death.³

2. Avenger (goel) and redeemer or ransomer.

The duty of blood-revenge in primitive times did not lie upon any court, but simply fell to the next of kin of

¹ Ex. 21:28.

² Ibid. Cf. Code of Hammurabi, Sect. 229, where same penalty was imposed for owners or builders of dangerous walls that caused death.

³ Frazer, Folk Lore in the Old Testament, pp. 398 ff., 405 f., 408 f.

the deceased. This custom was recognized everywhere. "Whoever sheds human blood, by human hands shall his blood be shed,"¹ i.e., by the nearest of kin in order of succession, either by son, brother, father's brother, or son of father's brother. Where kinship ended, then there was no avenger to mete out retaliation.² "Who will avenge me of mine adversary?" was a frequent cry. However, when there was no goel or 'waliyyu'd-dam' among the Arabs, then the tribal group took the cause of the injured in hand.³ The 'wali' or next of kin, was not the only protector of a tribesman's interests, Allah himself, was thought of as the wali of his people.⁴ In every case where the murderer was slain, he was put to death on behalf of the family of the man killed. The same method of dealing with homicides, still exists in the vendetta of Corsica, among the Mainotes in Greece, and the lynchings in the Southern States of North America.⁵

The principles underlying the function of the goel seem to be many. In the first place, the claims of the violated are to be satisfied. Abel's blood cries from the ground.⁶ In the next place the idea of restoration was closely allied with vengeance.⁷ Depletion of a family's strength by loss of blood, or loss of life, demanded the restoration of an equivalent.⁸ In the East there has existed a fixed tariff of blood-cancelling.

¹ Gen. 9:5. Cf. Deut. 19:1-13; Nu. 35:16-21.

² I Kings 16:11.

³ Sura 17:35. Cf. 6:152.

⁴ Ibid., 13:12 b.

⁵ Encyclopedia Brit. V, Art. 'Avenger of blood.'

⁶ Gen. 4:10; Cf. Job 16:18; Isa. 61:2; Ps. 58:11; Isa. 47:3.

⁷ Deut. 32:43; Cf. II Kings 9:7.

⁸ Ex. 21:18-27; 22:14-17; Lev. 27:1-8.

We notice in Numbers, chapter thrity-five, a strict prohibition of taking a ransom for blood, only the expiation of the shed blood of the killer will suffice.¹

The chief duty of the next of kin, or nearest agnate entitled to the succession, was to uphold the honor of the family and vindicate the the family's rights and violated integrity. The kinsman or goel, thus became a ransomer or 'redeemer.' This fact gives us the right interpretation of the passage in Job: "I know that my redeemer liveth."² As in the Book of Job, Jahveh is regarded in many instances as a goel or redeemer.³ The instances are too many to mention here.⁴

The fear of dying⁵ without a male representative, to guarantee the carrying on of his name, to inherit his land, and to minister at his tomb⁶, were looked upon as the greatest of calamities by the male heads of Hebrew families. The right of inheritance, we must remember, carried with it the duty of levirate marriage or agnation. For example, where the older brother dies, leaving a childless widow without a son to inherit the estate, the next brother is required to marry her also, "to raise up seed unto his brother."⁷ Only a direct male descendant could inherit the estate and offer appropriate rites at the family tomb. A bastard was never allowed to offer sacrifice to the dead.

¹ Nu.35:30-34.

² Job, 19:25. (See Moffatt's translation).

³ Cf. Lev. 25:25 ff., 47 ff.; Jer. 32:6-15.

⁴ Isa. 44:22-26.

⁵ Note. Cain's worst fear is of being banished to a foreign land where there will be neither human nor divine goel to avenge him if he should be slain. See Bade, The Old Test. in Light Today, p. 40.

⁶ Deut. 14:1. Cf. chap. 26:14 which indicates cult of the dead.

⁷ See Deut. 25:5-10. Note the custom of loosening the shoe.

The strange reason why only a fine was imposed on a man's concubine for committing adultery, and the death penalty if his wife committed the offense,¹ is understood when it is explained that if his wife conjugated with any other than her lawful husband, there would be great danger that the male head of the house might be left without a legitimate heir to tend the rites of his tomb. She alone is the authenticator of the legitimacy of his heir. When a primitive people believed in and practised ancestor worship, they would certainly take great care to safeguard the function of the rites at the tomb of the dead. To be buried in his own land, to be "gathered to his fathers," and receive the care of his tomb by his descendents, was the only heaven and comfort that the early Hebrew sheikh was certain of, after death.

There was another reason for safeguarding legitimacy. Hebrew society itself demanded that the full fighting strength of their warriors be propagated and guaranteed through their legitimate heirs. In the light of these facts we are able to understand the strange case of Judah and Tamar in the thirty-eighth chapter of Genesis.² After being married to the two older sons of Judah, 'Ev and Onan, and being prevented from marrying the third, Shelah, Tamar deceives her father-in-law and secures issue within the clan. When, however, Judah commands that she be burnt for whoredom, she reveals to him her true intention, and he exclaims; "She is in the right against me, for I did

¹ Deut. 22:23 ff. A fine only was imposed on a man having intercourse with his concubine.

² Gen. 25:

not marry her to my son Shelah."¹

In the Book of Ruth,² we find that the goel becomes the heir of the deceased. The widow is a part of the inheritance, and it is her duty to raise up seed and safeguard the inalienability of the landed estate.³

III. JUDICIAL PROCEDURE

1. General practice.

Outside of the self-operative and fundamental customs, such as the *lex talionis* and the *ge'ullah*, as seen above, there is very little clear evidence and exact outline of Hebrew judicial procedure. The word '*torah*' from '*horah*,' with root '*yarah*,' to throw or to cast—perhaps the sacred lot used at the sanctuary to ascertain the will of the deity—indicates the methods for securing decisions in primitive times.⁴

The Urim and Thummim, used in consulting Jahweh, were a sort of sacred dice cast or shaken before a metallic image, called an ephod. The question was always 'yes' or 'no.'⁵ Claims and disputes of the clan were settled in this way by bringing them before Jahweh, i. e., to the sanctuary, or the seat of the deity.

¹ Before the exile agnates only could be heirs, but after that period daughters could inherit the estate if there was no male issue. Lev. 18:6 (H) condemns the marriage of closely related persons. But see Mtt. 22:24 f.

² Ruth, 1:11; 4:12. An instance of *Zikne ha'-ir* law.

³ For further treatment see J. A. Bewer, 'The *Ge'ullah* in the Book of Ruth,' *Am. Jl of Semitic Lang.*, Vols. 19 and 20, 1903-4.

⁴ Josh. 18:6.

⁵ I Sam. 30:7, 8; Judg. 8:24-27; I Sam. 14:3-42; 20:36. In later Judaism the priest wore a dress called an ephod with Urim and Thummim kept in a pocket of the ephod, the primitive practice having long ago fallen into disuse.

One such place was En-Mishpat,¹ 'spring of judgement,' the scene of the legislative activity of Moses. Another such place was situated between Ramah and Bethel in the highlands of Ephraim, where the prophetess Deborah sat under a sacred palm tree, deciding the cases brought to her by the Israelites.² Another interesting method of detecting guilt was the water ordeal, mentioned in the fifth chapter of Numbers. Upon this test depended the death penalty in the case of an unfaithful wife.³

At all times the procedure of law was simple. The place of judgment was either before the sanctuary altar by the priest, or in the open place at the city gate by the elders.⁴ The personal appearance of the plaintiff and defendant was required.⁵ There was no public prosecutor. Proceedings were by word of mouth, though, later, a written accusation may have been required.⁶ Proof by at least two witnesses was necessary for conviction,⁷ except in the case of a father and his rebellious son.⁸ Talmudic law, as well as Josephus, state that only men of full age should bear witness, women and slaves being barred. False witness was punished by the *lex talionis*.⁹ When no witness

¹ Gen. 14:7.

² Judg. 4:4 ff. Cf. I Sam. 7:15 f.

³ Num. 5:11-31. See also W.R. Smith, *Religion of the Semites*, pp. 179 f., for the prevalence of this cruel practice.

⁴ Judg. 4:5; I Sam. 22:6; Deut. 21:19; 22:15; I Kings 7:7.

⁵ Deut. 17:5; 21:20; 25:1.

⁶ Job, 13:26; 31:35.

⁷ Deut. 17:6; 19:15; Nu. 35:30; Mk. 14:56 ff.; Mtt. 26:60.

⁸ Deut. 21:18 ff.

⁹ Chap. 19:18 ff.

appeared against the accused, he was then tried on his own oath.¹ Jahveh was also looked to in certain cases to indicate the guilty party.² As a rule, the sentence was carried out in the presence of the judge.³ In the case of a death sentence, the witnesses began the execution, and then the whole community joined in.⁴ If such were the practice today, of sentence and execution, one could imagine how difficult its enforcement would be in the case of capital punishment.⁵

The foregoing constitute the general practice of law as it obtained down through the time of the monarchy. There was, of course, the tendency to create courts of law, of which Deuteronomy furnishes the best evidence. In ancient times, trial by oracle came first, then follow the priests, 'Kohanim' (Levites), who tried cases both with and without the oracle, next developed the a system of regular courts, and the 'Shophetim' replace the 'Kohanim.'⁶ The king was supposed to be a just judge, and attended certain special cases, like his deputy and the superior court,⁷ he was also to maintain the covenant especially.⁸ Public justice was supposed to be administered without respect of persons.⁹

2. Methods of punishment.

Regarding the methods of inflicting the death penalty,

¹ Ex.22:6-11.

² Chap.22:8; I Sam.14:40 f.; Josh.7:14.

³ Deut.22:18; 25:2.

⁴ Chap.17:1.

⁵ Cf. Pericope Adulterae, John 7:53-8:11.

⁶ See Sulberger, 'The Polity of the Ancient Hebrews, Jewish Qr. Review, July, 1912.

⁷ See Ex.22:8; Deut.17:8; 19:16-19; 21:1-9; Nu.35:24-28.

⁸ Cf. David and the woman of Tekoah, II Sam.14.

⁹ Ex.23:2,6-8; Deut.16:18-20; 24:16; 25:1; 26:25; Lev.19:15,35.

stoning seems to have been the chief method recognized by Hebrew law.¹ The details about stoning are very few. It usually took place outside the habitation or the city.² In extraordinary cases, burning was imposed for sexual crimes as well as hanging and impalement, and denial of the privileges of burial.³ These offenders were likely killed before being burnt, as in the case of Achan.⁴ The word for the extermination of such social enemies was 'skeresh' to pull up by the roots.⁵ The offender and all that he possessed was to be entirely wiped out.⁶ In the extermination of their foreign enemies, the command was to "save nothing alive that breathes,"⁷ and show no mercy.⁸

3. Human sacrifice.

Evidence is not entirely lacking that the criminal was offered in a sacrificial manner. W.R. Smith says that execution constantly assumes sacrificial forms, the tribesman's life is sacred, even though he is a criminal.⁹ Sacrifice permeated the entire life of the Hebrews; the captured in war and the criminal offender were both slain in the same sense as sacrifices.¹⁰ In the mystery religions, a criminal was selected instead of the king, as a human sacrifice.¹¹ Lucian tells us that the victims were suspended from trees and the whole set on fire.¹² What took place in his day in Syria

¹ Cf. II Sam. 1:15; II Kings, 10:7:25; Jer. 26:23. et al.

² Lev. 24:14; Nu. 15:36; I Kings, 21:10 f.

³ Lev. 20:14; 21:9; Deut. 21:22. Cf. Josh. 7:25; Gen. 38:24.

⁴ Usually a cairn of stones was raised over the bodies, perhaps as a warning for others in the future. See Josh. 7:26; 8:29.

⁵ Psa. 52:5; Ezek. 7:26.

⁶ Lev. 14:12. Cf. 8:5; Nu. 18.

⁷ Deut. 20:17. Cf. II Sam. 7:9.

⁸ Deut. 7:2.

⁹ W.R. Smith, Religion of the Semites, p. 370.

¹⁰ W.G. Jordan in Peake's Commentary, p. 95.

¹¹ Gilbert Murray in Peake's Commentary, p. 632.

¹² Dea Syria, 49.

very likely occurred among the Hebrews at an earlier time. We learn, as a matter of fact, that Joshua seems to have hung up the king of Ai all day on a tree until he died.¹ Samuel certainly offered Agag, the Amalekite king, as a human sacrifice to Jahveh. "And Samuel hacked Agag to pieces 'before' Jahveh at Gilgal."² Death for a criminal might also take the form of impaling on a stake.³

Human sacrifice, though most certainly not confined entirely to criminals, was a very common practice among the Semites, and requires our attention as a form of inflicted death. The prohibition in Deuteronomy implies the existence of human sacrifice among the Hebrews.⁴ Micah's censorious interrogation, "Shall I offer my first-born son for my sin, fruit of my body for guilt of my soul?" indicates the existence of the custom even as late as his time.⁵ Other outstanding examples of human sacrifice are as follows: Abraham's attempt to offer up his son, Isaac;⁶ Jephthah sacrificing his daughter as a votive offering;⁷ Ahaz in dire need of the help of Jahveh against invasion, sacrifices his son to the deity, following the example of the king of Moab who sought help from Chemosh,⁸ and also the archaeological evidence of foundation sacrifices, secured in recent years.

Without doubt, the discovery of a vast number of jar

¹ Josh. 8:29.

² I Sam. 15:32 f.

³ Deut. 21:23.

⁴ Chap. 18:10.

⁵ Micah, 6:7 b.

⁶ Gen. 22.

⁷ Judg. 11:30-40.

⁸ II Kings, 3:27; 16:3.

burials beneath the foundations and in the walls of buildings, and in the vicinity of 'high places' or altars, at Taanach,¹ Megiddo,² and Gezer³, all prove the truth of Micah's protest.

We have at least, two undoubted proofs of this practice among the Hebrews, in the Old Testament itself, of foundation sacrifice. In the sixth chapter of Joshua, we find a curse laid upon any one who may rebuild Jericho, and that if the foundation should be laid it will be at the expense of his first-born.⁴ The second reference is found in the first book of Kings, where we read that Hiel, the Bethelite, laid the foundation of Jericho at the cost of his oldest son, Abiram.⁵ It is very interesting to note that Macalister tells of the discovery at Gezer, of a woman, over fifty years old, perhaps one who had become useless to the community, "deposited in a hollow left for the purpose in the corner of the building."⁶ He writes of another case, that of a man buried beneath the floor of a room, and from the appearance of the victim, it looked as if he had been bound. The left hand had been severed! Another foundation deposit contained the skeletons of two adults, and of a youth about eighteen years of age, who had been mutilated and severed in two at the waist. Another deposit in a cistern, of remains of fifteen persons, fourteen males from eighteen to fifty years old, and a female about sixteen. The latter had been cut in two before decay had set in. They

¹ Sellin, Tell Ta'annek, pp. 35-38.

² Schumacher, Tell el-Mustesellim, pp. 45, 54. Cf. Barton, Archaeology and the Bible, 4 ed. pp. 144 f.; ERE IV p. 119; Handcock and the Holy Land, p. 321.

³ Macalister, Excavation of Gezer, Vol. I and II.

⁴ Josh. 6:26.

⁵ Kings, 16:34.

⁶ Macalister, op. cit., p. 427, Vol. II. Note, the wall was built over the deposit, indicating a sure case of foundation sacrifice.

were, perhaps, victims of a single tragedy, possibly of a barbarous sacrifice of propitiation.¹ The adult victims in foundation sacrifices were few in comparison with infants and very young children, the deposits of which were found in all Semitic strata, and found near 'high places' and under foundations. They were placed in jars similar to ancient Egyptian rites, which required a life to secure the luck of houses. In some foundations also at Gezer were found bronze and silver models of men, representing human sacrifices, with silver food saucers, indicating the existence of the barbaric foundation rite, which time had attempted to soften. In the deposits of later periods, the presence of such objects as lamps and bowls only, in the corners of houses, showed them to be relics of the same custom.² Doubtless, our own practice today of making deposits in foundation stones, had its origin back in some such custom of the dim past. In Palestine, even today, when an important building is being erected an animal sacrifice is made.

4. Asylum.

The provision of asylum for accidental homicide was a very important measure in the development of Hebrew custom and law. This protection from the relentless goel undoubtedly had its basis in the "sacred claim of hospitality, which was superior to the demands of personal vengeance or religious prejudices."³ Immunity from immediate danger had

¹ Macalister, op.cit., p.430 f., Vol.II.

² Ibid., p.432.

³ Trumbull, Studies in Oriental Social Life, p.105-142.

always been possible by touching the tent pole, eating food together, and taking refuge at the altar. We would naturally expect that these customs of hospitality would sometimes be violated¹, but they were generally severely punished.

All ancient sanctuaries recognized asylum. The Book of the Covenant makes a provision for altar asylum² as a guard against the abuse arising from the relentless Semitic law of blood revenge. On the abolition of all sanctuaries outside Jerusalem during the Deuteronomic reform, it became necessary to provide some other recognized places of refuge, for the deliverance of the innocent manslayer³ from the pursuit of the goel, until the manslayer "stand before the congregation for judgment."⁴ The version of this law by the Priestly writer, gives the number of refuge cities as six instead of three as in Deuteronomy. We find no mention of a tribunal in the earlier code, but the elders are required to deliver the guilty slayer to the avenger that he may die.⁵ According to P, if the case is in the fugitive's favour, then he is allowed to remain in the city of refuge till the death

¹ For cases to the contrary see I Kings, 2:28, 34, where Joab is slain. Judg. 4:1-24, the case of Jael and Sisera. J.M.P. Smith thinks that the prose account has been altered, and that Jael slew Sisera before he had accepted drink, (see chap. 5:25-27) and was therefore not guilty of treachery. Rahab the harlot is spared for her hospitality. Josh. 6:16 f. See Gibeah, Judg. 19-20:1-48; W.R. Smith. Religion of the Semites, pp. 75 ff., Kinship and Marriage, pp. 48-52; I Kings 1:51.

² Ex. 21:12-14.

³ Deut. 19:1-21; 4:41-43.

⁴ Nu. 35:30.

⁵ Deut. 19:12 f. .

of the high priest, and is then free to go where he will.¹

If, however, the homicide ventures outside the bounds of the city before then, the avenger may kill him without incurring any guilt.² It is of interest to note that both the Hittite and the Hammurapi codes make the same distinction between murder and manslaughter. In the law of the latter there is mention of trial on capital charges before a court at a temple, yet there is no indication as to whether the homicide fled there to escape danger or not.

¹ Nu.35:25,28.

² Nu.35:26-28. See also other references to cities of refuge in Josh.20:1-9,13,21,27,32,36,38; I Chr.6:57,67.

PART III

CAPITAL OFFENSES

We come now to examine critically and in detail the various offenses which merited capital punishment in ancient Hebrew society.

I. CRIMES AGAINST THE DEITY

First and foremost are the various offenses against the deity

1. The worship of other gods.

Strange and cruel as some of these laws may seem to the modern mind, yet we must remember that they were made and enforced to prevent the evil effects that certain prohibited acts seem to have on the community. To ignore and forsake the god of the land was to incur the most disastrous consequences, not only for the individual and his house but the whole community.

When the Hebrews entered Canaan they encountered the worship and cults of the deities of the native population. A struggle ensued, particularly between Baalism and Jahvism, which did not come to a head until the time of the prophets. The Deuteronomic Reformation, brought about largely by the effects of the activity of the prophets, imposed the death penalty on all Hebrews for worshipping any other gods. In the earlier laws¹ the penalty for this crime was simply a with-

¹ Kent, *Israel's Laws and Legal Precedents*, p. 97. Cf. Ex. 22:19.

drawal of the protection of the tribe and deity. Deuteronomy now commanded that both men and women should be stoned, on the testimony of two witnesses, and that the hand of the witness was to be the first to be raised in execution.¹ To forget Jahveh, i.e., to go after other gods, meant certain destruction,² as well as to suffer all kinds of misfortune.³

In view of all this it is quite obvious, for example, that Aaron knew nothing of such stringent laws, or he would certainly not have erected the golden bull image;⁴ or that David would have allowed household gods in his household; nor would have Solomon built, or allowed to build, sanctuaries for Chemosh of Moab and Moloch (Melek) of the Ammonites.⁵ It is very likely that the foreign slaves that Solomon introduced into the Temple were nothing more than sacred prostitutes.⁶ As a matter of fact, Jahveh was both identified with and worshipped alongside of other deities, such as Moloch, down to the very time of the Reformation. Indeed there could have been no such reformation unless some such conditions existed. The severe penalties against idolatry were introduced and enforced to root out this practice which threatened to engulf Jahvism.

2. Apostasy.

For committing this offense, all the inhabitants of

¹ Deut. 17:2-7.

² Chap. 6:14-20.

³ Chap. 11:26, 29; 28:14-68.

⁴ Ex. 32:1 ff.

⁵ I Kings 11:7. Cf. also the word 'bosheth' in so many Hebrew names.

⁶ Cf. "The sons of the servant of Solomon," Neh. 7:57-60; Ezra. 2:53.



a city should be put to death by the sword and burnt.¹

According to Judges 21.the entire population of Jabesh Gilead was massacred,for not going up to Jahveh at Mizpah.² The death penalty was also imposed on apostate prophets (at a later period),³ as well as on the friend or nearest relative of a Hebrew found guilty of enticing another Hebrew to follow other gods.⁴

3.Idolatry.

It is to be noted that while the primitive codes prohibited molten idols,⁵ that Deuteronomy bars images of all kinds,including the asherah or sacred pole.⁶ The latter very likely represented the goddess of fertility,and stood in early times beside the 'high place,' masseba or pillar of Jahveh. Any man who made a graven image was accursed.⁷ The penalty for idolators was exile.⁸ Punishment for idolatry was so severe that it extended even to the fourth generation.⁹

4.Sorcery and divination.

It was just like human nature,that Saul the king,after driving out the wizards and mediums from his domain,should in his time of extremity,turn to the forbidden art.¹⁰ The practice of the cult was really about as latent,as the making of moon-shine liquor is under our own prohibition laws in our own time. The wealthy and privileged always know where to

¹ Deut.13:12-18.

² Likely a fictio juris for the slaughter,yet it shows the existence of such a law,which serves my point.

³ Deut.13:3b f. (A late insertion).

⁴ Chap.13:6-11.

⁵ Ex.34:17; 20:23b.

⁶ Deut.5:8-10; 16:21; (4:15-19).

⁷ Chap.27:15.

⁸ Chap.4:25-28.

⁹ Chap.5:9.

¹⁰ I Sam.28:9.

find forbidden service without fear of detection and punishment. The primitive code had stated that any sorceress should not be allowed to live.¹ Under the general category of 'abominations' Deuteronomy lumps all the cults of oracles, lots, divining, fortune-telling, charmers, mediums, wizards and necromancers.² It is likely that the cult practised by the witch of Endor was connected with the cult of the dead, a practice for which the Holiness code demanded the death penalty by stoning.³

The chief objection against witchcraft was doubtless due to the notion that anyone who indulged in it was "allying himself with some supernatural power to effect ends inimical to the general welfare."⁴ Such an art was, therefore, viewed with suspicion and was considered as an affront by a jealous tribal deity. Magic was thus directly connected with idolatry.⁵ The Rabbis later divided magic into three categories.

- (a) That which deserved the death penalty;
- (b) That which came under optical illusions; juggling, etc., which were forbidden but not punished;
- (c) The magical use of the Holy Name, which was sanctioned and used for the mastery over demonic powers.⁶

Magic, as Malinowski has pointed out, has really played a valuable

¹ Ex.22:18; Note the sex. Cf. Deut.18:10.

² Deut.18:9-12.

³ Lev.20:6,27.

⁴ Bade, The Old Testament in the Light of Today, p.80.

⁵ Micah, 5:11 f. Cf. Nah.3:4; Jer.27:9; Isa.47:9,12; Mal.3:5.

⁶ ERE, Art. 'Jewish Magic,' p.80.vol,VIII.

part in man's evolution. "Early man could not have mastered his difficulties, as he has done, nor could he have advanced to the higher stages of culture" without its aid. "Hence the unusual occurrences of magic in primitive societies and its enormous sway."¹

5. Sacrifice of children to other deities.

We have abundant evidence from the laws and the prophets that animals and children were slaughtered and offered as burnt sacrifices to Moloch. Ahaz and Manasseh each offered a son.² Exodus 13:12 tells us that the Hebrew deity had demanded every first-born, but Jeremiah protested that Jahveh had never enjoined such sacrifice.³ Ezekiel admits that such requirements are bad.⁴ It is pretty clear from these passages, that the notion had prevailed up to the time of the prophets, that Jahveh demanded the sacrifice of first-born children. The reformation, fortunately, changed this law.⁵ The Priestly code orders the death penalty for such a barbarous practice, but on other grounds than humanitarianism, namely, ritualism.

6. Blasphemy.

The dread penalty for profane use of the Sacred Name, came about as a result of the Josianic reformation. The demolition of all sanctuaries outside of Jerusalem, so as to

¹ Malinowski, Science Religion and Reality.

² II Kings, 16:3; 21:1-6; Jer. 15:4. Cf. Jer. 7:31; 19:4-6; Ezek. 16:20; II Kings, 17:17; Gen. 22; Isa. 30:33; Micah, 6:7.

³ Jer. 7:31 f.; 19:5; 32:35.

⁴ Ezek. 20:25 f., 31.

⁵ Deut. 12:29-31.

⁶ Lev. 20:2-5.

centralize worship at the capital city,very likely forbade the use of the Divine Name outside Jerusalem,particularly striving to abolish its use in connection with magic and divination and all foreign cults. In earlier times no such fear of the use of the name of Jahveh existed among the ordinary people. We,can see,however,because of the ancient superstitious,fear of the wrong use of a personal name, especially that of a deity,¹ the use also made of the name in forbidden cults,² and all intensified by the prophetic reforms and the ritualistic priestly tendency,that the prohibition and punishment would be most extremely severe. According to the Septuagint Greek translation of Leviticus 24:16 (H),anyone who merely named the name of Jahveh would be put to death. By the fourth century,it was no longer uttered in Judaism,the word 'Adonay' (Lord) being substituted instead. The High Priest used it once a year,and on his death-bed,when he whispered it in the ear of his successor.

In Leviticus 24.³ is a case of precedent regarding blasphemy.It is that of a son of an Israelite woman,whose father was an Egyptian,who has blasphemed or reviled the shem or name,or perhaps the Ark of the Covenant. From this it is clear that this law against blasphemy not only applied to full-blooded Hebrews,but also that a half-breed,alien

¹ Cf. Amos 6:10..

² Note that the witch of Endor used the name 'Elohim,' I Sam. 28:13.

³ Chap. 24:10-13.

or 'ger,' if guilty might suffer the same fate. The mention in the Holiness code¹ that the stoning was inflicted by the congregation, and in the Priestly code that Moses commanded this mode of death,² are both ideas of a late time read back into the past by scribal editors.

7. False prophecy.

A prophet is a most necessary but dangerous person. Men like Jeremiah who first lit "the light of burning heretics,"³ who dare to challenge the status quo, always arouse those whose vested interests are endangered. It is not at all unlikely that the law in Deuteronomy, which declared that if "any prophet who dares in his presumption to speak a word as from myself (Jahveh), which I never bade him utter . . . shall die,"⁴ was uttered against such prophets as Jeremiah,⁵ who had declared that the Sanctuary at Jerusalem, which had been a robbers' cave by the priestly class, would be destroyed the same as Shiloh.⁶ Because the prediction had not come to pass literally, Jeremiah and all such prophets stood condemned. Literal fulfillment became, then, the unworthy criterion of prophecy.⁷

8 Desecration of holy things.

Violation of the laws of the cult were most scrupulously avoided out of fear of polluting and endangering the welfare of the community. After the reformation greater caution was

¹ Lev. 24:16b.

² Chap. 24:13 f.

³ Lowell, *The present Crisis*.

⁴ Deut. 18:20, 22.

⁵ Battenwiser, *Prophets of Israel*, p. 29 f.

⁶ Jer. 7:8-15.

⁷ Chap. 7:21-22. (20 ff., are likely of a later period than D).

exercized,guarding against the adoption of foreign cults and strange gods,that the Hebrew cultus be kept free from pollution. All but the priests were excluded from the use of holy things;any other would be cut off as being 'unclean.'¹ Any Israelite who broke the taboo of coming too close to the tent of meeting,would find it fatal for him.² The stranger or 'ger' who came near was immediately put to death.³ No one was allowed as much as a glimpse of the holy things within.⁴ For partaking of the sacred food,while in a state of 'unclean-ness,' i.e, ritual uncleanness,meant the death penalty also.⁵ The rebellious son,mentioned in Deuteronomy,⁶ may have been put to death for an infraction of some taboo such as this.

9.Violation of the Sabbath.

In all of the primitive codes,the Sabbath is enjoined for humane reasons alone.⁷ It is not until a later time in Judaism,when the day was made a religious institution,do we find the death penalty being inflicted for working on the Sabbath.⁸ In the Priestly codes it had become not a day for man's use and benefit,but a taboo day for the deity. The case of the man gathering sticks,mentioned in Numbers⁹ is a very late tradition inserted as a precedent by the Priestly

¹Holiness Code,Lev.22:3b.

²Num.3:22.

³Chap.3:38b.

⁴Chap.4:17-20.

⁵Lev.7:20-21.

⁶Deut.21:20 f.

⁷Cf.Ex.34:21; 23:12. See also Deut.5:12-15;Ex.20:8-11;Lev.19:35:2; 31:13b-17.

⁸Ex.35:2; 31:13b-17.

⁹Nu.15:32-36.

chronicler.

We are unable here to enter into the discussion as to the origin of the Sabbath. It is possible that it originally came from Babylon, since, like the Babylonian 'Shabattum,' it was connected with the celebration of the full moon. Jastrow, however, points out that for the Babylonians the day was an evil and portentous one, while on the other hand, as we know, for the Hebrews, during the patriarchal age at least, it was a period of joy and feasting. In both cases, however, the original purpose does not seem to have been a rest day. Such a day, for example, was unknown in Israel when Deuteronomy promulgated its laws 621 B.C. By Nehemiah's time, however, the Sabbath had become under Priestly legislation, a ritualistic requirement, enforced by civil authority.¹ Its original character had long since faded into the background. The strict fidelity with which the Jews kept the Sabbath is well illustrated by the fact that when Antiochus Epiphanes attempted to enforce his edict, the Jews, rather than fight on their sacred day, allowed themselves to be cut down.²

II. CRIMES AGAINST THE COMMUNITY

Crimes against the state as we know it, hardly existed in early Hebrew society. Viewing their whole life as an undifferentiated unity, it is obvious that crimes against the community would be viewed under other categories. For them,

¹ Nehml0:31; 13:15-52.

² I Macc.2:31,38. Cf. Antiq.xiii,12,4; xiv,4,2;xviii,9,2;
Contra Apion,1:22.

we might say, church and state were one. Such anti-social acts which endangered the integrity of public tribunals, such as bribing and the circulation of false reports to prevent the exercise of justice,¹ perjury,² and deliberate defiance of law, were all punishable by death.³ Sodomy,⁴ bestiality⁵ and all other such acts which offended the common sense of decency, all met with an equal severity.

III. CRIMES AGAINST PROPERTY

"Notions of property tinge every phase of social life," says Lowie.⁶ The more developed a society, the more important property becomes in that social order. The acquisition of land and agricultural possessions by the nomadic Israelites, marked an important epoch in the development of their culture. The difference between nomadism and a settled state of society is well illustrated in the difference between the Hebrew and the Babylonian codes. Their fundamental difference, as Kent remarks, lies in the fact that "while the code of Hammurabi⁷ is prodigal of human life, the Hebrew laws carefully guard it; but in regard to property the emphasis is reversed."⁸ It seems correct to say that the best interests of Hebrew religion never lay in the material realm. We must not over-look the fact, however, that under the new environment of Canaan, most

¹ Ex.23:8; Deut.16:19a-20; 27:25; Ex.23:1-7; Lev.19:15.

² Deut.19:16-21.

³ Chap.17:12-13. Nu.15:30-31.

⁴ Lev.18:22; 20:13.

⁵ Ex.22:19; Deut.27:21; Lev.18:23-25; 20:15 f.; 18:19; 20:18.

⁶ Lowie, *Primitive Society*,

⁷ See Kent, *Israel's Codes and Legal Precedents*, pp.296 f., for Hammurabi Code, Sect.6-25. (Note).

⁸ *Ibid.*, p.119 (Footnote).

all new legislation brought into effect for the protection of the community, would most certainly be impregnated and coloured by ideas of property. In the main, then, as time went on, crimes against the community would be largely crimes against property.

1. Theft.

A heavy curse rested upon any who tried to steal land by removing landmarks.¹ The ancients placed the boundary stones under the protection of the gods, therefore making them sacred. The Roman law also stipulated that those who moved such landmarks would be slain.²

Kidnapping or stealing a slave was a most serious crime in all primitive societies. For stealing a child or inducing either a male or female slave to run away from the house of a patrician or plebian, the Hammurapi code inflicted a very severe penalty. Both the Book of the Covenant³ and Deuteronomy⁴ demanded the death penalty for the kidnapping of a fellow-Israelite. The Hittite code deals with the matter of slave-stealing, but it does not require the death of the evil-doer, but strangely enough it will give more in restoration for slave-stealing than for murder.⁵ If anyone happened to kill a thief at night, then the Hebrew code would not regard that as murder, but should he be killed in the day-

¹ Deut. 19:14; 27:17.

² Kent, *op. cit.*, p. 120 (Footnote).

³ Ex. 21:16.

⁴ Deut. 24:7.

⁵ Hittite code, Sect. 119, a, b.

light, it would then be regarded as murder.

An interesting question arises as to whether a slave owner might kill his slaves without impunity. The only justice dealt out in the case of deliberate murder was a mere punishing of the owner, if, however, the slave survived a day after being beaten and then died, the owner received no punishment at all.¹

2. Sexual offenses.

Since a man's wife and his daughters were looked upon as property, having no rights of their own, sexual crimes will be dealt with here under the heading of crimes against property. It is highly significant that there is no word in Hebrew to express a man's unfaithfulness to his wife. Any such wrong committed against a man's wife or daughter was regarded simply as an injury against his property, and punishment was meted out on this basis. The Hammurapi code was most severe in such cases, as we might expect. If a man's wife was found lying with another man, they were both strangled and cast into the water.² The Hebrew (Priestly) code, was hardly so severe, a curse was simply pronounced by the priest, that her sexual parts shrivel up.³ Deuteronomy and the Holiness code, both, demanded the death penalty of the man and the woman.⁴ The same punishment was imposed if the woman happened to be a betrothed virgin, since she,

¹ Ex. 21:19-21.

² Hammurapi code, Sect. 129, 133. So with the Hittites.

³ Nu. 5:12; 6:13a, c, 15-18, 21 f.

⁴ Deut. 22:22; Lev. 18:20; 20:10.

like the married woman, is simply her husband's property.¹ If a man happened to commit the offense with a betrothed slave girl, then a guilt-offering to Jahveh atoned, because she was not free.² If the act happened to be committed in the open country, then, the man only, suffered death.³ In the case of an unbetrothed virgin, the seducer is required to pay the father a fine and then marry her.⁴ The Deuteronomic and the Holiness codes prohibited the following as unlawful marriages: with a father's wife,⁵ with a half-sister,⁶ with a mother-in-law,⁷ with one's mother or sister,⁸ with a granddaughter, or with an aunt, daughter-in-law, or with a sister-in-law.⁹ The penalty for incest was equally severe.¹⁰ Perhaps we ought to add in this connection, that although these offenses were primarily against property, yet we would not be fair in thinking that common feeling did not exist as to the unnaturalness of some of these acts, and were expressed by social disfavour by the Hebrews. But, primarily, in early Hebrew society, the head of the house, the baal, lord and owner, could do pretty nearly what he wished with his own property. We have but to remember the very prevalent and horrible custom of child sacrifice among the Israelites to realize the truth of this.

¹ Deut.22:23 f.

² Lev.19:20 f. In Syria her father could ravish the wife of the evil-doer.

³ Deut.22:25. So also in Assyrian law.

⁴ Ex.22:16; Deut.22:28 f.

⁵ Deut.22:20 f.

⁶ Chap.27:22.

Generally speaking, then, a man was a criminal only in so far as he interfered with the rights and property of others, or committed acts inimical to the welfare of the community. What law there was, was largely made by males and in their favour. For example, if a husband failed to find evidence of virginity in his newly married wife, he could bring her to the elders of the town, have her convicted and then stoned to death.¹ Nothing is said about a wife's similar rights regarding the morality of her husband. Both polygamy and concubinage were practised and recognized as lawful. One is quite certain in saying that the more rigid laws of post-Reformation days could not have been in existence or in operation in the more primitive days, when morals were very lax. We have but to be reminded of such cases as that of the relations of Abraham's wife, Sarah, with Abimelek,² of David's murder of Uriah, the Hittite, to obtain his wife,³ and also the practice of levirate marriage,⁴ that capital punishment for such offenses, was of very late introduction.

IV. CRIMES AGAINST THE PERSON

1. Crimes against parents.

Properly, crimes were considered as being against

⁷ Deut. 27:23.

⁸ Lev. 18:9.

⁹ Chap. 18:10-18.

¹⁰ The penalty was stoning and burning. Cf. Ham. code, Sect. 155 f.

¹ Deut. 22:20 f.

² Gen. 20.

³ II Sam. 11.

⁴ Gen. 38.

the male head of the family only, in such cases. The Hebrew father had absolute power of life and death over his children. They were like his wives and slaves, so much property. We have but to remember the attempt of Abraham to sacrifice his son, Isaac,¹ the case of Jephthah and his daughter,² as well as the several other notable instances of human sacrifice, to realise the power the male head of the house had over his children. The extreme penalty was inflicted for disobedience. The Hammurapi code decreed that the offender's both hands should be cut off, if he committed violence to his parents.⁴ The crimes against parents for which the death penalty in Israel was carried out were, striking, cursing and insulting.⁵ After trial before the elders of the town, the parents' fellow-citizens carried out the punishment by stoning the offender to death.⁶ Rabbinical law mitigated the severity of the Deuteronomic law.⁷ Sulzberger believes that this punishment for disobedience to parents was a survival of an ancient Zikne bar-'ir law, which had to do with apostasy, or the teaching of false views. Sorer means idolatry.⁸ As Sulzberger says, it seems strange that a child not too old to be whipped by his parents, should be guilty of

¹ Gen. 22. Note that Isaac sold his daughter into concubinage and slavery. Ex. 21:7-11.

² Judg. 11:34.

³ Lev. 18:21; 20:2-5; II Kings 23:10; Jer. 32:26

⁴ Ham. code, Sect. 195. Not so severe as Hebrew code, here.

⁵ Ex. 21:15-17; 20:12; Deut. 5:16; 21:18-21; 27:16; Lev. 19:3a.; 20:9.

⁶ Cf. Prov. 20:20; 30:11, 17.

⁷ Deut. 21:18-21; 27:16.

⁸ Moore, Judaism, II p. 134 f.

⁸ Isa. 65:2-7; Jer. 5:25; Hos. 4:15; etc.

of drunkenness and of gluttonness.¹ He was guilty of the crime of S-a-r-a-h.

2. Murder.

The original intention of the law against murder was that it find its application to members within the clan. If a Hebrew were to slay a foreigner there was no punishment for such. But if one Israelite strike another, so that he shall die, the manslayer shall be put to death, declared the Book of the Covenant.² From earliest times great care would be taken within individual clans to keep up the full strength of its man power, so to deter members from within from slaying one another and thus weaken their fighting strength, a heavy penalty was inflicted. We have already seen that the method for dealing such a crime when committed, was by the lex talionis and blood revenge. Accidental homicide or manslaughter, was taken care of, as we have noted, by the cities of refuge.

In the case of injury to a pregnant woman and she should die in miscarriage, then life for life, was the exaction.³ The code of Hammurapi declared that if a man beat a woman that was pregnant, then the offender's daughter should be killed.⁴ The Assyrian law impaled a wife and left her unburied should she bring on a

¹ Sulzberger, 'The Polity of the Ancient Hebrews,' in the Jewish Quarterly Review, July, 1912.

² Ex. 21:12-14, 20 f. See also, Deut. 5:17; 21:18, 27; 27:16; Lev. 19:3a.; 20:9.

³ Ex. 21:22-25.

⁴ Hamm. code, Sect. 210.

miscarriage of her own accord.¹

False witness which brought about the death of the innocent, was viewed as being equally as bad as murder itself. The principle of talio then went into operation and the false accuser himself was put to death.² The extreme penalty, imposed in Exodus 22, for wronging the defenceless,³ is a provision made at a very much later period and read into the past. Kent properly remarks that among "most primitive peoples, resident aliens had no legal rights and were therefore the objects of every form of injustice."⁴ When we compare the conditions that must have existed in the times of the great prophets, such as Amos, and remember their vigorous protests against the wealthy and ruling classes for their injustice to the poor, we can hardly believe the penalty of death could have been exacted at any time previous to the Reformation, for wronging the defenceless.

¹ KAV, I.vii:92-viii:105.

² Ex.23:1-9.

³ Chap.22:23 f. Cf.Deut.27:18 f.; Lev.19:14,33.

⁴ Kent, Israel's Laws and Legal Precedents, p.127. (Footnote).

SUMMARY AND CONCLUSION

Man lives first and thinks afterward. Perhaps that is his justification for living. Unfortunately he has paid dearly for his superstition and ignorance, his prejudices and hatreds. Too often the poor and the unfortunate have been the victims. The pathway to justice and freedom is bestrewn with its sacrificial pyres and heaped stones, its crosses and gibbets. Man will doubtless live long and suffer and think and learn thereby.

We have glanced back over the brief but remarkable history of the early Hebrews. We have become acquainted with their fears and hates, their superstitions and beliefs. We have viewed briefly the various crimes or social offences for which refractory individuals and groups paid the extreme penalty. In the first place punishment was meted out on the basis of the evil effects that the criminal's act was supposed to have upon the community. Penalties were inflicted for overt acts only. Secondly, the security of the whole outweighed the welfare of the individual. The only responsibility known was that of the group. The guilt of the criminal rested on his whole house and his community. Wives and little children had no rights of their own; they perished with the group.

In the third place, rigid custom, enforced with divine sanction, was the basis of all law and its execution. Religious violations were consequently viewed as criminal offences. Breaches of taboo, "clean" and "unclean" brought fatal consequences.

The transition from a nomadic existence to a settled

agricultural life and the acquisition of property, increased the severity of punishment and increased the number of crimes punishable by death. The Book of the Covenant, the first attempt to collect laws among the Hebrews, indicates the increasing attention paid property, while human life seems to be of less value.

The unifying link in early society being blood-kinship, therefore, in the fourth place, blood-revenge and *lex talionis* become the dominant principles in Hebrew legislation. Shed blood demanded appeasing and satisfaction in Hebrew thinking. An avenger or redeemer, human or divine, was absolutely necessary to repay and restore for injury suffered. Christian theology and our current theory of the Atonement in particular, have taken over this same idea of retributive justice and penal view of punishment. Human sacrifice among the Israelites indicates how far-reaching was their conception of Jahveh as a revengefull deity.

The Deuteronomic Reformation had some ameliorative effects towards humanizing life, but the gains secured in making a distinction between murder and manslaughter, and the declaration that the criminal's children should no more suffer for the parent's misdeeds, were outweighed by the cruel laws against idolatry. The Priestly legislation in turn was no more humane, being more concerned with ritual than with the sanctity of human life.

The most marked advancement for human betterment in Hebrew society is to be found in the valiant protests of

the great prophets, for individualism and humanity, and in their attack upon the vested interests and institutions of pagan civilization. The spirit of individualism, pride and independence inherited from the desert, where manhood was held at par value, made its valuable contribution in the advance for human betterment.

The enlightened Christian conscience can no longer accept the standards of the Old Testament, especially the law of retributive justice. Will Durant has recently with blunt succinctness, summed the feeling of a vast number of people of the present moment. "The community as a whole", he says, "when it supplies the law of the pre-Christian period—'a life for a life'— suffers a greater degree of moral degradation than society gains when it applies the hideous punishment of death, which is not and never will be a deterrent . . . That the world is progressing is illustrated by the fact that today we have the electric chair and the gallows as the last remnants of the ancient savagery that demanded a life as payment for a life taken. To utter the name of the gentle Christ and then demand the penalty of death for our brothers brands us as a state — a nation— of hypocrites".¹

These are strong words, yet they are significant. We know very well that retributive justice is still the spirit of our laws, especially those laws we have made for our social and political and economic enemies. All law, indeed must be

1. Editorial, San Francisco "Bulletin" Jan.17, 1929.

subjected to the ideals of Jesus in order to rid our minds of our sacred superstitions. Law makers never make ethical principles. They do well to enforce them. Jesus was the first to fully realize and point out the inadequacy of external law and force. The spirit and motive, and not the overt act which the Jewish religion had so emphasized, was to be dealt with, Jesus contended.¹

Finally, the worth of the individual person makes it impossible that he be sacrificed for the good of the community as was done in early Hebrew society. To do so is to fail to recognize the most fundamental fact of life, namely, that the individual is a product of the community in which he lives. "To suppose that infliction of retributive suffering suffices, without reference to concrete consequences," says John Dewey, "is to leave untouched old causes of criminality and to create new ones by fostering revenge and brutality. The abstract theory of justice which demands 'vindication' of law irrespective of instruction and reform of the wrong-doer, is as much a refusal to recognize responsibility as is the sentimental gush which makes a suffering victim out of the criminal. . . . Our entire tradition regarding punitive justice tends to prevent recognition of social partnership in producing crime; it falls in with a belief in metaphysical free-will. By killing an evil-doer or shutting him up behind stone walls, we are enabled to forget both him and our part in making him."²

¹ See Mtt. 5:38-42; 7:12; Lk. 6:27-36.

² Dewey, Human Nature and Conduct, pp 17 f.

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